

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

NORMAN PHILLIP DEVOLK,

Plaintiff,

vs.

No. CIV 01-0774 PK/JHG-ACE

BOARD OF REGENTS OF THE
UNIVERSITY OF NEW MEXICO,
d/b/a UNIVERSITY OF NEW
MEXICO HEALTH SCIENCE
CENTER, BOARD OF COUNTY
COMMISSIONERS OF
BERNALILLO COUNTY, BCDC
CORRECTIONS OFFICER SGT.
TIM ARNOLD, THE CITY OF
ALBUQUERQUE, NEW MEXICO
and ALBUQUERQUE POLICE
OFFICER RICHARD VALDEZ and
T. SHOLTIS,

Defendants.

MEMORANDUM OPINION AND ORDER

THIS MATTER comes on for consideration of pending motions: (1) Defendant Board of Regents' Motion for Partial Summary Judgment filed September 7, 2001 insofar as Count six of the Second Amended Complaint is concerned (see Docs. 25, 28, 41, 67, 135, 138); (2) Defendants Board of County Commissioners of Bernalillo County and the City of Albuquerque, New Mexico's

Motion for Summary Judgment filed March 14, 2002 (Doc. 131); Board of County Commissioners of Bernalillo County's Motion for Summary Judgment filed March 14, 2002 (Doc. 133); and Defendants Valdez, Sholtis and City of Albuquerque's Motion for Summary Judgment filed March 22, 2002 (Doc. 136).

Upon consideration thereof,

(1) Plaintiff asserted several New Mexico Tort Claims Act claims against various Defendants, including Defendants Valdez, Sholtis, Arnold, the City of Albuquerque, the Board of County Commissioners of Bernalillo County and the Board of Regents of the University of New Mexico. Doc. 1, Ex. A. Counts 1-7 (second amended complaint). Claims brought under the federal (as well as the New Mexico) constitution include Count 8 (arrest and seizure without probable cause) and Count 9 (excessive force). Count 8 names Defendants Valdez and Sholtis; they are also named in Count 9, along with Defendant Tim Arnold. Count 10 names Defendants Board of County Commissioners and the City of Albuquerque in a claim brought under the federal (as well as the New Mexico) constitution alleging an unconstitutional policy, and training or supervisory liability.

(2) Defendant Tim Arnold has been dismissed by the court without prejudice. Doc. 130. All claims against Defendants Sholtis and Valdez and the City of Albuquerque, in its capacity as their employer, have been dismissed on Plaintiff's motion. Doc. 156. Insofar as federal claims asserted in Counts 8 &

9, there are no longer any remaining defendants. Insofar as the federal claims asserted in Count 10, the named Defendants moved for summary judgment on the grounds that there is no evidence of unconstitutional custom or policy to impose municipal liability and the actions of one jail guard would be insufficient. Doc. 132 at 7-10. In response, Plaintiff argued that there was a custom or policy of non-reporting of inmate abuse and that nothing was done in response to the incident with the Plaintiff. Thereafter, Plaintiff stated:

Under the circumstances, Plaintiff chooses to concede to the dismissal of the constitutional policy liability claim against the City and County as alleged in Count 10 of the Second Amended Complaint unless the Court, in the interests of justice, believes it should be maintained. Plaintiff renews his request to the Court to permit him to amend his complaint to name the individuals eventually found by Plaintiff to have been responsible for the civil rights violations. Plaintiff proceeds on his State court claims which are unassailable.

Doc. 140 at 13-14. Plaintiff is the master of his lawsuit, the court cannot really make strategic decisions on which claims should be pursued. Given the progress of this case, it is too late to amend to add unnamed parties without undue prejudice. The court agrees with the Defendants that Plaintiff is agreeing to the dismissal with prejudice of his federal claims contained in Count 10. Doc. 148 at 1.

In accordance with Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 350 (1988), a district court should consider the exercise of supplemental jurisdiction at all stages of the litigation. See also Roe v. Cheyenne Mountain Conference

Resort, Inc., 124 F.3d 1221, 1237 (10th Cir. 1997). Once the federal claims have been dismissed, a federal court may decline to exercise supplemental jurisdiction over state law claims. 28 U.S.C. § 1367(c)(3). It is appropriate to consider whether the remaining state law claims in this case should be remanded. See Pacificare of Okla., Inc. v. Burrage, 59 F.3d 151, 152, 155 (10th Cir. 1995). With the basis for removal jurisdiction gone, and because the case raises important questions about the applicability of the New Mexico Tort Claims Act in these circumstances (that ought to be resolved by the New Mexico courts), the court will remand the state law claims to state court. See 28 U.S.C. § 1367(c)(1); Ball v. Renner, 54 F.3d 664, 669 (10th Cir. 1995); see also Archuleta v. Lacuesta, 131 F.3d 1359, 1368 n.4 (10th Cir. 1997) (Baldock, J., dissenting) (state law claims may be remanded even when federal claims remain in suit).

NOW, THEREFORE, IT IS ORDERED, ADJUDGED and DECREED:

- (1) that the federal claims contained in Count 10 of the Second Amended Complaint against Defendants Board of County Commissioners of Bernalillo County and the City of Albuquerque are dismissed with prejudice.
- (2) that the case is remanded to the Second Judicial District Court (Bernalillo County) of the State of New Mexico.

DATED this 17th day of May 2002, at Santa Fe, New Mexico.

Paul Kelly J.
United States Circuit Judge
Sitting by Designation

Counsel:

D. Penni Adrian, Adrian & Salazar, P.C., Albuquerque, New Mexico, and Kathryn Hammel, The Hammel Law Firm, P.C., Albuquerque, New Mexico, for Plaintiff.

Jeffrey L. Baker, The Baker Law Firm, Albuquerque, New Mexico, for Defendants Board of County Commissioners of Bernalillo County, and the City of Albuquerque.

Kathryn Levy, Assistant City Attorney, and Robert M. White, City Attorney, Albuquerque, New Mexico, for Defendants Valdez, Sholtis and the City of Albuquerque.

W. Ann Maggiore, Butkus, Gay & Jahner, P.C., Albuquerque, New Mexico, for Defendant the Board of Regents of the University of New Mexico.